FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID MATHEWS, SECRETRARY OF HEALTH, EDUCATION AND WELFARE,

Petitioner,

v.

MISTER SANDERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATEMENT OF CASE

The Statement of the case as set forth in Petitioner's Brief at pp. 2-8 thereof is substantially accurate and the same is adopted by Respondent.

SUMMARY OF ARGUMENT

The Petitioner, the Secretary of Health, Education and Welfare, hereinafter called Secretary, maintains that Section 205(h) of the Social Security Act (SSA) precludes judicial review of reopening petitions because the only jurisdictional basis of review from decisions of the Secretary is Section 205(g) and that that Section does not provide for such review; and, that the Administrative Procedure Act (APA) is not an independent grant of jurisdiction and therefore cannot serve as the jurisdictional basis for the review of reopening petitions.

Section 205(h) of the Act is 42 USC Section 405(g), and Section 205(g) of the Act is 42 USC Section 405(g) of the Act.

Respondent Sanders maintains that Section 205(h) of the Act is not a preclusion of District Court review of reopening petitions. The vast weight of authority which has considered the matter in the factual context of the case at bar so holds. Additionally, there is a presumption of reviewability of administrative decisions unless a clear statutory intention to the contrary is manifest. No such intention is manifest in the SSA itself or in the legislative history thereof.

Most cases find the jurisdictional basis under the APA to review the Secretary's denial of reopening petitions for possible abuse of discretion. Other cases hold that the District Court correctly entertains jurisdiction to review subsequent applications or so-called petitions to reopen without regard to the APA and without discussing the jurisdictional question. These latter cases state merely that the classic defense of Res Judicata should not be unyielding where the administrative decision is manifestly erroneous; and that the dictates of equity and fundamental fairness require that

an erroneous administrative decision should not remain undisturbed because of the Res Judicata Doctrine.

Recent Surpreme Court Decisions have so liberalized the construction of Section 205(g) of the Act that that very Section may provide the jurisdictional basis to review reopening petitions.

The Secretary's own regulation providing for reopening of prior determinations at any time for error on the face of the evidence extends indefinitely the time for filing review of denials thereof under Section 205(g) of the Act.

Since APA jurisdiction is limited to an ascertainment of abuse of discretion relative to reopening petitions and since petitions for reopening filed more than four years after the decision on the merits can be reopened only for manifest error on the face of the evidence there will not be, and there has not been, a plethora of relitigation of old claims.

The APA is an independent grant of subject matter jurisdiction and the respondent Sanders adopts the arguments contained in Section III of Amicus Curiae brief in this regard.

ARGUMENT

I.

THE SOCIAL SECURITY ACT DOES NOT PRECLUDE JUDICIAL REVIEW OF THE SECRETARY'S REFUSAL TO REOPEN A DECISION DENYING A CLAIM FOR DISABILITY BENEFITS.

A. Section 205(h) of the Social Security Act 42 USCA 405(h) is not a preclusion of District Court jurisdiction to review decisions of the Secretary except as provided in Section 205(g) of the Act 42 USCA 405(g).

1. Preface to Argument.

In most cases involving a so-called "Petition to Reopen" a prior decision, the Petition is in fact a new application addressed to the same claim previously denied by the Secretary. It is not unusual for a claimant to file two or more subsequent applications after an initial denial. Frequently, it is after the denial of such a subsequent application that an attorney enters the picture and files appropriate civil action in the District Court. See for example, *Maddox v. Richardson*, 464 F.2d 617 (6th Cir. 1974).

Almost uniformly, the Secretary will dismiss the subsequent application on the basis of administrative res judicata pursuant to SSA Regulation No. 4 (20 CFR 404.937). If District Court civil action is filed subsequent thereto, the Secretary will plead a Motion to Dismiss the complaint on the following basis: Since the subsequent application was dismissed by the Secretary on the basis of res judicata, the decision of the Secretary was one made without a "hearing"; that Section 205(g) of the Act is the sole jurisdictional basis of review; and that since the "hearing" requirement of Section 205(g) is absent in a case so dismissed by the Secretary on the basis of administrative res judicata, then the District Court is without jurisdiction to entertain the action before it.

The older cases to be sure have endorsed the logic of the Secretary and subsequent applications were dismissed. See for example *Felice v. Celebrezze*, 319 F.2d

443 (9th Cir. 1963). In 1966, the case of *Cappadora v. Celebrezze*, 356 F.2d 1 (2nd Cir. 1966) was decided. This case involved the dismissal by the Secretary of a subsequent application on the basis of res judicata. In recognizing District Court jurisdiction to review, the Court reasoned that the subsequent application for benefits may be regarded as a petition to reopen the initial determination, particularly since such a procedure is recognized by the Secretary's regulations concerning reopening (20 CFR 404.957). It would follow, the Court reasoned, that the District Court should be permitted to review the Secretary's refusal to reopen the initial determination but only for the limited purpose of ascertaining an abuse of discretion in so doing pursuant to the Administrative Procedure Act. See 5 USC 701-706. "The application can be considered in effect . . . a discretionary reopening of the 1954 determination under the Administrative Regulations." *Cappadora v. Celebrezze, supra*, at page 3.

A line of cases evolved following the *Cappadora* doctrine using the APA as the underlying basis of jurisdiction to review. Other cases, as discussed below, find or presume jurisdiction to review such determinations on other bases–particularly where the record discloses error on the face of the evidence.

In the instant case, Respondent Sanders filed a subsequent application for benefits after a prior application for the same benefits was denied by the Secretary. Having no attorney, Sanders did not file a District Court civil action to review the Secretary's denial. More than 4 years later, Sanders refiled an identical application. The Secretary dismissed the subsequent application on the basis of administrative res judicata pursuant to 20 CFR 404.937. It was at this point that Sanders retained counsel and the civil action by way of complaint was filed in the District Court which

complaint alleged, inter alia that the prior determination contained "error on the face of the evidence." See complaint at page 2 of the Appendix.

Again, the Secretary filed a Motion to Dismiss the complaint on the basis that the application for benefits was denied on the basis of administrative res judicata; that such a denial is made without a "hearing"; that Section 205(g) is the only basis for review; that since there was no "hearing" the requirements of Section 205(g) review were not met; that therefore there was no subject matter jurisdiction in the District Court to review the complaint of Sanders. With this argument the District Court agreed and the complaint was dismissed. Sanders filed appropriate appeal on the 7th Circuit Court of Appeals which reversed on the basis that jurisdiction exists under the APA.

Consistent with the authorities cited herein, Sanders contends that his subsequent application for benefits be treated as a Petition to Reopen the initial determination because of error on the face of the evidence, contained therein.

2. The overwhelming weight of authority holds that Section 205(h) of the SSA does not preclude review of the Secretary's refusal to reopen prior final decisions.

The following cases which so hold further decide that the basis of jurisdiction in such situation is the Administrative Procedure Act (APA) 5 USC 701-706: *Ruiz-Olan v. Secretary of Health, Education and Welfare* (C.A. 1 1975), 552 F.2d 1056; *Cappadora v. Celebrezze* (C.A. 2 1966), 356 F.2d 1; *Davis v. Richardson* (C.A. 3 1972), 460 F.2d 772; *Lejeune v. Mathews* (C.A. 5 1975), 526 F.2d 950; *Wallace v. Weinberger* (C.A. 6 1976), 528 F.2d 700; *Sanders v.*

Weinberger (C.A. 7 1976), 522 F.2d 1167. Other Circuits have noted District Court jurisdiction to review the Secretary's refusal to reopen prior decisions or subsequent applications without regard to the APA: See, for example, *Grose v. Cohen* (C.P. 4 1969, 406 F.2d 823) and *Lauritzen v. Weinberger* (C.A. 8 1975) 514 F.2d 561.

Thus the First, Second, Third, Fifth, Sixth and Seventh Circuits have found a jurisdictional basis to review the Secretary's refusal to reopen prior decisions under the APA while the Fourth and the Eighth Circuits find jurisdiction without regard to the APA as is hereinafter discussed.

Only the Ninth Circuit has held to the contrary. See *Stuckey v. Weinberger* (C.A. 9 1973) 488 F.2d 904. It should be noted that the Stuckey case was decided *en banc* and that five of the Justices filed a concurring opinion in which they asserted that "we agree that a limited area of judicial review has been afforded by the Administrative Procedure Act and that the second sentence of 42 USC Section 405(h) should not be construed to preclude judicial review; that the sentence 'simply forbids attempts to review final decisions on the merits by any route other than provided in Section 405(g).'" See *Stuckey v. Weinberger, supra*, at page 912.

The majority view follows the lead of *Cappadora v. Celebrezze, supra*, wherein the Court reasons as follows: "Although it could be argued that the second sentence of Section 405(h) of the Social Security Act is a statutory preclusion of such review, the more reasonable construction is that this simply forbids attempts to review final decisions on the merits by any route other than provided in Section 405(g)." 356 F.2d at page 5. Therefore, under the *Cappadora* view, since Section 205(h) does not expressly exclude the APA as a basis

to review reopening petitions then by implication the APA is available for such purposes.

3. There is a presumption of judicial review and where the statutory intention is not clear, the presumption of review should prevail.

Such is the holding of Case Law and Text Writers. The Social Security Act makes no provision for review of decisions of the Secretary except such decisions as are made after a hearing. There remains therefore a category of decisions by the Secretary for which no review provision is made. Included in this category are decisions of the Secretary refusing to reopen prior determinations as in the instant case. It is conceded that the Social Security Act makes no express provision for a review of the Secretary's decision in refusing to reopen a prior determination. It should be conceded equally however that the Statute 205(h) does not preclude review by its express terms. The intention of the Statute is at best therefore unclear in which case the presumption of reviewability should prevail. As stated by the Court below: "The Supreme Court has held that there is virtually a presumption of judicial review of administrative action. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), unless a contrary purpose is fairly discernible in the statutory scheme, *Data Processing Service v. Camp*, 397 U.S. 150, 157 (1970). Agency action is normally found to be non-reviewable 'only upon a showing of clear and convincing evidence of a contrary legislative intent.' " *Abbott Laboratories v. Gardner, supra*, 387 U.S. at 141. Clearly the absence of statutory language expressly authorizing judicial review is insufficient to off-set the presumption that administrative action is reviewable. Indeed, judicial review of such administrative action is the rule, and

non-reviewability an exception which must be demonstrated.' " *Barlow v. Collins*, 397 U.S. 159, 166 (1970). See decision of Court below in *Sanders v. Weinberger*, 522 F.2d at page 1170. Likewise, the text writers support the presumption of reviewability. "In most cases, statutes or common law decisions make clear the reviewability of an administrative action at the suit of at least one or more classes of potential plaintiffs. But in cases of statutory ambiguity or silence, and in new situations in which there are factors pro and con, the issue of reviewability may become acute. In such situations the presumption of reviewability plays a decisive role." Jaffe, *Judicial Control of Administrative Action*, page 336. See also Gellhorn, *Administrative Law and Process*, pages 245-246; and 4 Davis *Administrative Law Treatise*, Section 28.04, 28.05 (1958).

4. Section 205(h) of the Social Security Act does not preclude review under the APA.

There is no mention of the APA in Section 205(h). The proviso of that Section is simply this: There shall be no review of final decisions of the Secretary made after a hearing except pursuant to the procedure outlined in Section 205(g) and, further, that no Social Security actions shall be instituted under Section 42 of Title 28 (U.S.C. 1331). The Administrative Procedure Act was enacted in 1946, some seven years after the enactment of Section 205(h) of the Social Security Act. Obviously then Section 205(h) did not contemplate the APA. As was noted in the dissenting opinion written by Justice Brenan in *Weinberger v. Salfi*, 422 U.S. 749 "... but the sentence does not say that no action of any kind shall be brought under Section 1331, or other general grants of jurisdiction. ..." And as stated by five Justices in the concurring opinion of *Stuckey v.*

Weinberger, supra "... that a limited area of judicial review has been afforded by the Administrative Procedure Act and that the second sentence of 42 USC 405(h) should not be construed to preclude judicial review...." And as stated by the Court in the leading case of *Cappadora v. Celebrezze, supra*, "the fact that reopening is a matter of agency discretion to a considerable extent ... does not lead inevitably to a conclusion that such an exercise of administrative power is wholly immune from judicial examination; Section 10(e) of the Administrative Procedure Act expressly authorizes the Courts to set aside any administrative decision constituting an abuse of discretion."

Again, the vast majority of Circuits which have considered the applicability of the APA in the specific factual context before this Court have held that Section 205(h) does not preclude review of decisions of the Secretary for an abuse of discretion under the APA. *Ruiz-Olan v. Secretary of Health, Education and Welfare, supra; Cappadora v. Celebrezze, supra; Davis v. Richardson, supra; Lejeune v. Mathews, supra; Wallace v. Weinberger, supra; Sanders v. Weinberger, supra.*

5. The legislative history of the SSA fails to reveal an intention to preclude review of Petitions to Reopen prior determinations.

Despite the speculations of the secretary, a search of the legislative history of the SSA fails to reveal the true intention with regard to the interpretation of Section 205(h) from the standpoint of Reopening Petitions.

It should be observed, however, that if the true intent of Congress was to preclude all judicial review except for final decisions made after a hearing, the draftsmanship of the Act leaves much to be desired.

Certainly the more reasonable interpretation of Section 205(h) as observed by the Court in *Cappadora* is that "... the more reasonable construction is that this [Section 205(h)] simply forbids attempts to review final decisions on the merits by any route other than provided in Section 405(g)." [42 USC 405(g)]. *Cappadora v. Celebrezze*, at page 5.

Ten years have passed since the leading case of *Cappadora v. Celebrezze* decided that Section 205(h) does not preclude review under the APA. Since then numerous courts have followed *Cappadora*'s lead. The Congress has had adequate opportunity to amend the statute if the Courts were erroneously interpreting it. Obviously, no such action on the part of Congress has taken place. In January, 1976, Public Law 94-202 (Social Security Act–Hearing and Review Procedures) was enacted. This law extensively amends the hearing and review procedures of the Social Security Act, but no mention is to be found in the legislative history of the Act or in the Act itself of an intent to nullify the *Cappadora* holding. See Congressional Record Volume 121 (1975); 89 statutes 1135 (1976).

6. Recent Supreme Court cases hold that the District Court is not precluded by Section 205(h) from reviewing decisions under Section 205(g) even though the literal requirements of a "final decision after a hearing" have not been met.

In *Weinberger v. Salfi*, 422 USC 749 (1975) as well as in *Mathews v. Eldridge*, 424 U.S. 319 (1976) the Court held that the District Court does indeed have jurisdiction to review decisions of the Secretary even though such decisions are not such as were made after a hearing. In each of the foregoing cases the Court held that the requirement of a hearing may be waived.

The classic argument of the Secretary based upon *Felice v. Celebrezze, supra*, is that there is no avenue of review under the Social Security Act except Section 205(g); and that where the literal requirements of a final decision made after a hearing are absent there can be no review of any decision of the Secretary. Clearly, these Supreme Court decisions contradict this argument.

B. Three bases of jurisdiction exist to review reopening petitions: The Administrative Procedure Act, Section 205(g) of the Social Security Act and the inherent power of the Court to review decisions containing error on the face of the evidence.

1. Jurisdiction exists under the Administrative Procedure Act.

The provisions of the Federal Administrative Procedure Act, 5 USC 701-706 are found at pp. 2A and 3A of Appendix to Petitioner's Brief. As previously noted, the leading case of *Cappadora v. Celebrezze, supra*, found a jurisdictional basis of review in the APA, and since that time numerous circuits have followed the *Cappadora* reasoning. *Ruiz-Olan v. Secretary of Health, Education and Welfare, supra; Davis v. Richardson, supra; Lejeune v. Mathews, supra; Wallace v. Weinberger, supra; Sanders v. Weinberger, supra.* The *Cappadora* Court stated that "... Section 10E of the Administrative Procedure Act expressly authorizes the Courts to set aside any Administrative decision constituting an abuse of discretion."

Only the sharply divided Court in *Stuckey v. Weinberger, supra*, has held to the contrary, with five Justices in a concurring opinion stating that "we agree

with the Second Circuit for the reasons set forth in *Cappadora v. Celebrezze* ... that a limited area of judicial review has been afforded by the Administrative Procedure Act...." 488 F.2d at page 912.

The principal argument of the Secretary denying the applicability of the APA to review Reopening Petitions is that (a) Section 205(h) precludes such review as above discussed, and (b) the APA is not an independent grant of jurisdiction. The latter subject is treated separately below.

2. Section 205(g) of the Social Security Act is a jurisdictional basis to review Reopening Petitions.

This contention is admittedly at odds with the cases following *Cappadora* wherein it is expressly held that Section 205(g) is not the jurisdictional basis for such review because the literal requirements of a "final decision made after a hearing" are absent in such decisions.

As noted above the recent Supreme Court cases of *Weinberger v. Salfi, supra*, and *Mathews v. Eldridge, supra*, have liberalized the interpretation of Section 205(g) by holding that its requirement of a hearing is not indispensable to District Court jurisdiction under that Section.

Certain pre-*Cappadora* decisions held that a denial of a subsequent application did satisfy the 205(g) requirements of a final decision after a hearing even though the subsequent application was dismissed by the Secretary without a hearing. See for example, *Langford v. Fleming*, 276 F.2d 215 (5th Cir. 1960).

In the Brief of Amicus Curiae, a further basis of Section 205(g) jurisdiction is advanced which may be summarized as follows: Since Section 205(b) of the Act mandates a hearing whenever requested on an

application for payment of benefits, and since the subsequent application of Respondent in this case is an application for benefits under Section 205(b) then the hearing requirement of Section 205(g) is met and therefore the District Court has jurisdiction to review. The matter of Section 205(g) jurisdiction is extensively discussed at Section I of Amicus Curiae Brief. Respondent adopts the arguments of Amicus Curiae so set forth in Section I of its Brief.

There is another basis upon which Section 205(g) may provide jurisdiction for District Court review of Reopening Petitions as discussed in paragraph B 4 below.

3. The District Court has inherent power to review Administrative decisions of the Secretary which contain error on the face of the evidence.

Without discussing the jurisdictional basis therefor, an impressive line of authority has evolved from the Fourth and the Eighth Circuits holding that the District Court has jurisdiction to review the Secretary's denial of subsequent applications or of so-called reopening petitions for the purpose of ascertaining whether the record contains error on the face of the evidence. *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969); *Leviner v. Richardson*, 443 F.2d 1338 (4th Cir. 1971); *Easley v. Finch*, 431 F.2d 1351 (4th Cir. 1970); *Harrah v. Richardson*, 446 F.2d 1 (4th Cir. 1971); *United States v. Smith*, 482 F.2d 1120 (8th Cir. 1973); *Lauritzen v. Weinberger*, 514 F.2d 561 (8th Cir. 1976).

By virtue of the Secretary's own regulations, certain decisions are non-final. Such decisions are those that contain error on the face of the evidence. Therefore, the reasoning of these decisions seems to be that there is jurisdiction to review the determination of whether the record contains error on the face of the evidence.

The regulation in question is codified at 20 CFR 404.957 and which in pertinent parts states as follows: "An initial, revised or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final . . . may be reopened: . . . (C) at any time when . . . (8) such . . . determination or decision . . . is unfavorable . . . to the party thereto but only for the purpose of correcting . . . error on the face of the evidence on which such determination or decision was based." 20 CFR 404.957-C-8.

Error on the face of the evidence has been defined in the Social Security Administration Claims Manual as follows: "An error on the face of the evidence exists where, on the basis of all the evidence in the file on which the determination or decision was based and any evidence or record anywhere in the Administration at the time such determination or decision was made, it is clear that the determination or decision was incorrect." Social Security Claims Manual Section 7015; cited in *Lauritzen v. Weinberger, supra*, 514 F.2d at page 563.

The leading case in this area is *Grose v. Cohen, supra.* In *Grose*, the record revealed that the Secretary incorrectly attributed to Grose all of the earnings from his paper route and the Secretary incorrectly found that Grose alone could operate the paper route whereas the uncontradicted evidence disclosed that Grose could not operate the paper route without help and assistance from members of his family. After the denial of his claim for benefits by the Secretary, Grose failed to prosecute a civil action for review in the District Court within sixty days pursuant to Section 205(g) of the Act. At a later date however Grose filed a subsequent application for the same benefits. In typical fashion the Secretary interposed the defense of res judicata and asked that the subsequent application be dismissed. In

rejecting the Secretary's contention, the Court in *Grose* distinguished Administrative res judicata from judical res judicata and stated that Administrative res judicata should not be as rigid and unyielding as judicial res judicata; that when traditional precepts of res judicata do not work well in administrative law they should be relaxed; particularly since the Secretary's own regulations recognize that it is undesirable to attribute finality to every administrative decision, citing the reopening regulation 20 CFR 404.957-C-8. The *Grose* Court stated that "while the regulation is couched in terms of reopening a decision otherwise final, it also serves to identify decisions that should not be interposed to deny subsequent applications. A decision that is subject to being reopened provides an inappropriate bar. *The dictates of equity and fundamental fairness* that allow a decision containing error on the face of the evidence to be reopened preclude use of the same decision as a foundation for res judicata." *Grose v. Cohen, supra*, emphasis supplied.

In following the lead of *Grose*, the Courts in the 4th and the 8th Circuits variously announced the reasons for rejecting the defense of res judicata as a bar to subsequent applications. In *United States v. Smith, supra*, the Court stated that administrative res judicata is not applied with the same rigidity as its judicial counterpart because practical reasons may exist for refusing to apply it, citing *Grose*; and in *Leviner v. Richardson*, likewise quoting *Grose*, the Court states that res judicata is no bar where clearly there is error in the prior determination.[1] In *Lauritzen v. Weinberger,*

[1] *Leviner v. Richardson, supra*, involves a Reopening Petition within four years of the decision on the merits of good cause, pursuant to 20 CFR 404.958. The Regulation provides that error on the face of the evidence is included in good cause.

supra, after discussing the *Grose* principle, the Court states "the question is whether an injustice has been done." In *Harrah v. Richardson, supra,* and in *Easley v. Finch, supra*, the Court referred to "manifest error on the face of the evidence" as supplying the basis for the well established exception to the doctrine of res judicata. The Court in *Easley* states "in *Grose* . . . we recognize that the doctrine res judicata is not to be so inflexibly applied to work manifest injustice. In keeping with that principle we held the doctrine inapplicable in a case where the Secretary's decision was founded on error manifest on the face of the record. In so holding we did no more than apply an exception so well recognized that it is codified in the Social Security regulation 20 CFR Section 404.957."

The Courts in the 4th and 8th Circuits do not grapple with the jurisdictional issue nor with the applicability of the Administrative Procedure Act. Jurisdiction may well be predicated upon the presumption of review as set forth in Section A3 hereof, or upon a liberal interpretation of the literal requirements of Section 205(g). Indeed the Court in *Leviner* at footnote 9 of the decision notes that the action is being prosecuted pursuant to Section 205(g). Certainly the later cases of this Court in *Salfi v. Weinberger* and *Mathews v. Eldridge* would lend support to such an interpretation. Prior to its adoption of the *Cappadora* view, the 5th Circuit entertained jurisdiction to review a subsequent application without discussing the jurisdictional basis therefor. See *Craig v. Finch,* 416 F.2d 721 (5th Cir. 1969).

There is an undercurrent in the 4th and 8th Circuit decisions indicating that there is always jurisdiction to review the applicability of the Secretary's own regulations, or as held in *Leviner v. Richardson, supra*, to determine whether res judicata was properly applied.

Even in the single most important precedent relied upon by the Secretary–*Stuckey v. Weinberger, supra*–the Court states at page 911 of the decision "of course judicial review is available to determine the validity of the regulations themselves."

In the case at Bar the District Court dismissed the complaint without attempting to review the record of the prior proceeding for error on the face of the evidence even though such error was alleged in the complaint. The Court below noted that the record was not available in the District Court because the Secretary refused to provide it. See decision in case below *Sanders v. Weinberger*, 522 F.2d at page 1169. Obviously then, the District Court could not have concerned itself with the Record of the prior determination since the record was not filed with the Court. In the *Leviner* case, the Court of Appeals remanded to the District Court with instructions to review the record for possible error on the face of the evidence.

4. The District Court has jurisdiction under Section 205(g) to review the Secretary's final determination on the merits for error on the face of the evidence at any time.

In pertinent part, Section 205(g) of the Act reads as follows: "Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision *or within such further time as the Secretary may allow. . . .*" (Emphasis supplied.) As above noted, the Secretary's own regulations allow for a reopening at any time for the purpose of correcting error on the face of the evidence. 20 CDR 404.957-C-8.

It is thus apparent that the claimant may obtain full review of the Secretary's final determination on the merits if he commences a civil action within sixty days thereof, and that the claimant can obtain limited review thereafter by filing a civil action alleging error on the face of the evidence but only to ascertain the presence of such error on the face of the evidence. By his regulations, the Secretary has extended the sixty-day period in which a claimant may file a civil action to review the decision for the limited purpose above indicated.

Under this view, the literal requirement of a hearing in Section 205(g) is satisfied because the decision under scrutiny is the final determination of the Secretary on the merits which indeed involves a hearing. Otherwise stated, the matter under review is not the Secretary's decision refusing to reopen the initial determination but rather the initial determination itself is sought to be reviewed but only for the limited purpose of ascertaining error on the face of the evidence.

Although this position was not urged or briefed below, and although no precedent is cited wherein this specific argument was advanced, it appears a perfectly reasonable construction of the statute and the regulation. It may very well be the underlying rationale of the cases cited above emanating from the 4th and the 8th Circuits. Indeed, the leading case of *Grose v. Cohen, supra*, prefaces its remarks by observing, "ordinarily an administrative decision becomes final unless a civil action is filed in the District Court within sixty days. Section 205(g) of the Act . . . under the doctrine of res judicata the final decision may become the basis of denying subsequent applications." *Grose* then goes on to pronounce its error-on-the-face-of-the-evidence exception to the res judicata doctrine.

This construction of Section 205(g) would further resolve the potential dilemma facing the Courts which obviously are bent upon finding a basis of jurisdiction to review reopening petitions on one theory or another. This is not surprising, since the Courts should be ever mindful of the humane purposes of the Social Security Act. In numerous instances, as here, the applicant is uneducated and without counsel at the stage when his 205(g) right to review runs its sixty-day course. In *Gold v. Secretary, Health, Education and Welfare* the Court stated: "Hearings under the SSA are non-adversary." *Gold v. Secretary, Health, Education and Welfare*, 463 F.2d at page 43 (2nd Cir. 1972). To allow review would be more in keeping with the purposes of the SSA then to disallow it.

II.

TO ALLOW REVIEW OF REOPENING PETITIONS WILL NOT RESULT IN A PLETHORA OF RELITIGATION OF OLD CLAIMS.

The Secretary argues that to allow review of Reopening Petitions would ". . . burden the Courts with repetitive efforts to review stale claims. . . ." Petitioner's Brief, page 19. This contention is untenable. Under the APA review is permitted only for the limited question of whether the Secretary abused his discretion in disallowing the Reopening Petition. In review of decisions on the basis of error on the face of the evidence the Court would be limited to consideration of that narrow issue. As error on the face of the evidence is defined (Claims Manual Section 7015) it is to be hoped that instances where such error is present would be

rare. Likewise it is to be hoped that the Secretary would rarely abuse his discretion.

There could be no "repetitive" litigation because once the reviewing Court passes upon the narrow issue of abuse of discretion or of error on the face of the evidence the Court's decision would constitute judicial res judicata.

Amicus Curiae compiles all cases of Reopening Petitions since *Cappadora* was decided in 1966. See Brief of Amicus Curiae Appendix p. 1a-4a. The extent of such litigation is relatively slight.

Being mindful of this potential objection, the Court in *Cappadora v. Celebrezze, supra*, observed that ". . . a review of refusals to reopen, necessarily limited to abuse of discretion, would impose a relatively slight burden on the agency and the Courts. . . ." *Cappadora v. Celebrezze, supra*, 356 F.2d at page 5.

III.

THE ADMINISTRATIVE PROCEDURE ACT IS AN INDEPENDENT GRANT OF JURISDICTION.

(Respondent Sanders here adopts the arguments on this issue as set forth in Part III of the learned Brief of Amicus Curiae, Administrative Law Center at pp. 27-48 thereof.)

CONCLUSION

The District Court possesses jurisdiction to review Social Security Reopening Petitions. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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